

Exhibit A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

In Re:) CA No. 01-12257-PBS
PHARMACEUTICAL INDUSTRY) CA No. 07-10248-PBS
AVERAGE WHOLESALE PRICE) MDL No. 1456
LITIGATION) Pages 1 - 49

MOTION HEARING

BEFORE THE HONORABLE PATTI B. SARIS
UNITED STATES DISTRICT JUDGE

United States District Court
1 Courthouse Way, Courtroom 19
Boston, Massachusetts
November 5, 2007, 4:00 p.m.

LEE A. MARZILLI
OFFICIAL COURT REPORTER
United States District Court
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<p style="text-align: right;">2</p> <p>1 A P P E A R A N C E S:</p> <p>2 For the Plaintiffs:</p> <p>3 GEJAA T. GOBENA, ESQ., United States Department of</p> <p>4 Justice, Civil Division, Commercial Litigation, Fraud,</p> <p>5 601 D Street, N.W., Washington, D.C., 20004.</p> <p>6 JAMES JOSEPH BREEN, ESQ., The Breen Law Firm,</p> <p>7 5755 North Point Parkway, Suite 39, Alpharetta, Georgia,</p> <p>8 30022.</p> <p>9 For the Defendants:</p> <p>10 JAMES R. DALY, ESQ., Jones Day,</p> <p>11 77 West Wacker, Chicago, Illinois, 60601-1692,</p> <p>12 for Abbott Laboratories.</p> <p>13 ALSO PRESENT:</p> <p>14 LAURIE A. OBEREMBT, ESQ., United States Department of</p> <p>15 Justice, P.O. Box 261, Ben Franklin Station, Washington,</p> <p>16 D.C., 20044.</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>	<p style="text-align: right;">4</p> <p>1 MR. DALY: Aciclovir.</p> <p>2 THE COURT: Aciclovir.</p> <p>3 MR. DALY: Well, Aciclovir, Judge, yes, and if you</p> <p>4 went our way on that issue, it would only be around -- you'd</p> <p>5 go six years back from when they brought it in, which would</p> <p>6 actually -- actually, Aciclovir, if you went that way, Judge,</p> <p>7 would probably still be out because they filed Aciclovir in</p> <p>8 June of '07. You go back six years --</p> <p>9 THE COURT: Who -- did you dream up the R1-G2?</p> <p>10 MR. DALY: Well, we struggled with how to define</p> <p>11 these things and --</p> <p>12 THE COURT: It's unbearably complicated the way</p> <p>13 you've briefed it, so I'm not even sure I completely</p> <p>14 understand the sequence of events. But let me start off: I</p> <p>15 don't want to waste time on whether it's the first amended</p> <p>16 complaint or the second amended complaint because either way</p> <p>17 I would give them leave to move to file. I think you've got</p> <p>18 a good argument that it really is the second one because if</p> <p>19 you take the Baylor case, the complaint in intervention is</p> <p>20 really an amended complaint. That's what gives them the</p> <p>21 relation back, and I've bought that.</p> <p>22 But so what? So they move for leave to amend, and</p> <p>23 I allow it. So maybe they technically should have filed a</p> <p>24 motion. Let's get to point two: What does that do?</p> <p>25 MR. DALY: Which point is that, your Honor?</p>
<p style="text-align: right;">3</p> <p>1 P R O C E E D I N G S</p> <p>2 THE CLERK: In re: Pharmaceutical Industry Average</p> <p>3 Wholesale Price Litigation, Civil Action No. 01-12257, will</p> <p>4 now be heard before this Court. Will counsel please identify</p> <p>5 themselves for the record.</p> <p>6 MR. GOBENA: Gejaa Gobena on behalf of the United</p> <p>7 States.</p> <p>8 THE COURT: No, you have to speak up.</p> <p>9 MR. GOBENA: Sorry. Gejaa Gobena on behalf of the</p> <p>10 United States.</p> <p>11 MR. BREEN: Jim Breen representing Ven-A-Care of</p> <p>12 the Florida Keys.</p> <p>13 MR. DALY: Good afternoon, your Honor. Jim Daly on</p> <p>14 behalf of Abbott Labs.</p> <p>15 THE COURT: So instead of watching the Patriots-</p> <p>16 Colts game last night, I decided to wade through this</p> <p>17 impenetrable mess in terms of the timing of all these</p> <p>18 complaints. So I guess you are the moving party. As I</p> <p>19 understand it, no matter what happens here, this case doesn't</p> <p>20 go away. It's a question of dealing with one drug and a</p> <p>21 bunch of NDCs, right?</p> <p>22 MR. DALY: Correct, Judge. I think, even if you</p> <p>23 went all our way, there would still be about a year left, but</p> <p>24 it would whittle it down substantially.</p> <p>25 THE COURT: Of Aciclovir. How do you pronounce it?</p>	<p style="text-align: right;">5</p> <p>1 THE COURT: Which is, let's assume they move for</p> <p>2 leave to amend for a second amended complaint. In other</p> <p>3 words, they don't do it as a matter of right. I would</p> <p>4 probably allow them to do it, and then the question is, well,</p> <p>5 what does it relate back to? But then your point is that</p> <p>6 there was nothing to --</p> <p>7 MR. DALY: There's nothing to intervene on, Judge.</p> <p>8 THE COURT: Intervene on. So don't waste time on</p> <p>9 whether it's the first or second amended complaint.</p> <p>10 MR. DALY: All right, your Honor, I understand</p> <p>11 that.</p> <p>12 THE COURT: That won't get us very far.</p> <p>13 MR. DALY: Do we pick it up right there?</p> <p>14 THE COURT: Yes. So then they've got the statute</p> <p>15 which says you need the express consent of the Attorney</p> <p>16 General. And your basic argument is that the declination is</p> <p>17 tantamount to a written consent.</p> <p>18 MR. DALY: Right. They came in and specifically</p> <p>19 indicated they were not intervening in the other drugs, were</p> <p>20 intervening on these four drugs, which are 41 NDCs. And then</p> <p>21 Mr. Breen on behalf of the relator came in and said, "You</p> <p>22 know what? We're going to file our amended complaint by</p> <p>23 adopting the United States' complaint."</p> <p>24 THE COURT: Put him aside for a minute. Do you</p> <p>25 have any case that says declining to intervene is the same</p>

<p style="text-align: right;">6</p> <p>1 thing as written consent to drop?</p> <p>2 MR. DALY: I don't think we have a case that says</p> <p>3 specifically that, Judge, but where would we be if that's not</p> <p>4 the case? In other words, what is being intervened in? I</p> <p>5 mean, when we tried to get the file in this case, for</p> <p>6 example, they kept telling us, before the Court ordered them</p> <p>7 to turn it over, that "Oh, all that stuff in the past doesn't</p> <p>8 matter. You don't have to get that because all that relates</p> <p>9 to Abbott is in this new complaint, our complaint in</p> <p>10 intervention that we, the United States, have filed and the</p> <p>11 relator has adopted as its amendment." Once that happened,</p> <p>12 there's nothing in the -- there's nothing in the netherworld</p> <p>13 of claims sitting around waiting to jump out at, because</p> <p>14 where would they go? Do they go to you?</p> <p>15 THE COURT: The statute says "express consent." So</p> <p>16 I see so many of these. We're whistleblower heaven here. So</p> <p>17 what ends up happening is, they agree to intervene on some</p> <p>18 claims and not on others. And I've had that in Neurontin.</p> <p>19 There's a bunch of them that that's happened on.</p> <p>20 MR. DALY: Right.</p> <p>21 THE COURT: Or they decline to intervene at all.</p> <p>22 You couldn't say that was tantamount to consent that they can</p> <p>23 dismiss, I mean, because I think the theory at the end of the</p> <p>24 day is -- maybe it's because the resources of the local U.S.</p> <p>25 Attorney's office doesn't permit them to, or maybe they're</p>	<p style="text-align: right;">8</p> <p>1 of nightmare about this. There was no express consent to</p> <p>2 drop. As I understand it, the relator dropped, dropped it.</p> <p>3 MR. DALY: Right.</p> <p>4 THE COURT: And the government didn't protest, in</p> <p>5 fact seemed to go along with it, so --</p> <p>6 MR. DALY: They served me with the papers.</p> <p>7 THE COURT: I understand that, but I don't know</p> <p>8 what that means. I think in the statute, doesn't it say</p> <p>9 "express consent"?</p> <p>10 MR. DALY: I'm not sure of the exact language. I</p> <p>11 think it does talk about consent, but I think that if</p> <p>12 you're --</p> <p>13 THE COURT: It's a mess.</p> <p>14 MR. DALY: -- if you're co-plaintiff, the relator</p> <p>15 that you're joined at the hip with says, "I'm dropping all</p> <p>16 these claims and I'm adopting your complaint as my new</p> <p>17 amended complaint," all those things go away. And I don't</p> <p>18 know -- as I say, I'm trying to raise a practical problem --</p> <p>19 who has control over those claims? Is it you?</p> <p>20 THE COURT: I hope not.</p> <p>21 MR. DALY: I don't think the Court thinks that</p> <p>22 you've got this big brown bag of claims that nobody's ever</p> <p>23 seen before, and I don't think Judge Gold thinks that</p> <p>24 either. And I think that the reason that we all think that</p> <p>25 is because when they came out of the box in 2006, they said,</p>
<p style="text-align: right;">7</p> <p>1 not sure yet, or whatever it is -- no one has said that that</p> <p>2 means that they can dismiss, "they," the relator.</p> <p>3 MR. DALY: Well, but they did, and this wasn't done</p> <p>4 in secret. I mean, they were joined at the hip when they</p> <p>5 opened this thing up in Florida, and then we transferred it</p> <p>6 here. It's not as if the government is saying that "Oh, we</p> <p>7 weren't --" they served us with those papers. They said,</p> <p>8 "Here's our intervention, and here's the relator's adoption</p> <p>9 of our complaint as the new complaint," period, end of</p> <p>10 story. I don't think there's anything to go back to.</p> <p>11 Who has these claims; in other words, these claims</p> <p>12 that they're just sort of picking out of this bottomless pit</p> <p>13 of claims?</p> <p>14 THE COURT: You're right, the relator dropped it.</p> <p>15 You're right, the relator dropped it. And then the question</p> <p>16 is, so did they validly drop it?</p> <p>17 MR. DALY: But where are they? In other words, do</p> <p>18 they go to you? Do they go to Judge Gold in Florida? I</p> <p>19 mean, they've continually told us throughout this litigation</p> <p>20 that "There's nothing left in Florida. Everything we have to</p> <p>21 say about Abbott is in this complaint and in front of</p> <p>22 Judge Saris in Boston. You don't need to see the file. You</p> <p>23 don't need to --"</p> <p>24 THE COURT: I agree it's as sloppy as it gets, but</p> <p>25 also there's also the statute, so that's what creates a sort</p>	<p style="text-align: right;">9</p> <p>1 "This is our complaint in intervention. This is our amended</p> <p>2 complaint."</p> <p>3 THE COURT: I forgot to look it up. Does the</p> <p>4 statute say "express consent," or does it say --</p> <p>5 MR. GOBENA: It says "express written consent from</p> <p>6 the court and the United States."</p> <p>7 THE COURT: So that's the problem you run into is</p> <p>8 the statute. So the problem is, you're right, I mean, they</p> <p>9 botched it up procedurally, but I don't have express written</p> <p>10 consent. I have implied.</p> <p>11 MR. DALY: Well, you do have by the court. It says</p> <p>12 "by the court and the Attorney General." But the court</p> <p>13 approved it, and they allowed the relator to amend by</p> <p>14 adopting the United States' complaint. I mean, that's clear</p> <p>15 as a bell.</p> <p>16 THE COURT: You certainly have implied consent, but</p> <p>17 you don't have express written consent is the problem. I</p> <p>18 don't know where that leaves you.</p> <p>19 MR. DALY: Well, and, you know, if you want to talk</p> <p>20 about the statute, another thing I want to emphasize with the</p> <p>21 Court is, for them to intervene on something like this, they</p> <p>22 need good cause. The U.S. can intervene on a claim if</p> <p>23 they've got good cause. I don't think there's anything to</p> <p>24 intervene on because these claims weren't there, you know, in</p> <p>25 June of this year when they intervened on it. But even if</p>

<p style="text-align: right;">10</p> <p>1 they were, what is it that the government tells us is their</p> <p>2 reason for wanting to come into this case? They say, "Oh, we</p> <p>3 have new evidence concerning Aciclovir." And I don't know if</p> <p>4 the Court had a chance to look at --</p> <p>5 THE COURT: I know, but I can't decide that on a</p> <p>6 motion to dismiss. That's like a summary judgment motion.</p> <p>7 MR. DALY: Well, except that the things that they</p> <p>8 say are new were attached to the complaint in 1997. In other</p> <p>9 words, there's nothing new about Aciclovir in this new</p> <p>10 complaint. The letter that they talk about and the</p> <p>11 allegation that somebody at Abbott said, "We're going to</p> <p>12 widen the spread," that is in the complaint that the relator</p> <p>13 filed in 1997. It's the relator's third --</p> <p>14 THE COURT: And why is that relevant? Because?</p> <p>15 MR. DALY: Because this isn't new. This notion</p> <p>16 that there's new evidence that they found that they want to</p> <p>17 bring these Aciclovir claims has completely unraveled. The</p> <p>18 very allegations that they make in this new complaint were in</p> <p>19 the complaint filed by the relator in 1997, in the R-3</p> <p>20 complaint.</p> <p>21 THE COURT: Why is that relevant?</p> <p>22 MR. DALY: Because they said that they're entitled</p> <p>23 to do this because they have new evidence. There is no new</p> <p>24 evidence. The evidence is ten years old.</p> <p>25 THE COURT: This is such a complicated set of</p>	<p style="text-align: right;">12</p> <p>1 MR. DALY: Well, the reason it's ten years later is</p> <p>2 that ten years have gone by. You know, we've been prejudiced</p> <p>3 by this. We've had a year and a half of discovery. Our</p> <p>4 discovery period ends in two months. We've been working away</p> <p>5 on this. Every request we make --</p> <p>6 THE COURT: All right, so this is just about a</p> <p>7 tardy amendment is what you're saying.</p> <p>8 MR. DALY: Well, that's one of our arguments.</p> <p>9 THE COURT: You know, it's like the typical</p> <p>10 Rule 15(a) kind of discussion.</p> <p>11 MR. DALY: Correct, and I also think that then you</p> <p>12 look at why are they saying we're bringing this. When they</p> <p>13 first come to the court, they say, "We're bringing it because</p> <p>14 we have new evidence." We looked at the new evidence, and we</p> <p>15 found out that the new evidence that they cite was attached</p> <p>16 to the complaint that was filed in 1997. There is no new</p> <p>17 evidence on this.</p> <p>18 THE COURT: Assume you're right, there's no new</p> <p>19 evidence. Why can't --</p> <p>20 MR. DALY: So they have no reason for not -- the</p> <p>21 decision to do this when they opened up against us in 2006</p> <p>22 was conscious. This isn't some mistake.</p> <p>23 THE COURT: That happens every day of the week on a</p> <p>24 motion to amend. So what you're really saying is that you</p> <p>25 should get -- I shouldn't do it because you're prejudiced.</p>
<p style="text-align: right;">11</p> <p>1 briefings. Let me just get this. If leave to amend is</p> <p>2 liberally granted, and assume for a minute there was not</p> <p>3 express written consent from the Attorney General so the</p> <p>4 claim is still out there in the netherlands, why can't they</p> <p>5 just amend?</p> <p>6 MR. DALY: Because I think under the False Claims</p> <p>7 Act, they still need good cause, and I think the Court has to</p> <p>8 look --</p> <p>9 THE COURT: Good cause to?</p> <p>10 MR. DALY: To intervene and pick up these claims</p> <p>11 that they say are out there, and I think the Court has to</p> <p>12 look --</p> <p>13 THE COURT: Normally they don't have to show good</p> <p>14 cause to intervene, do they?</p> <p>15 MR. DALY: It's in the statute. Sure.</p> <p>16 THE COURT: They just intervene, I mean --</p> <p>17 MR. DALY: Well, then they have to have good cause</p> <p>18 to do so, and the Court has to look at that.</p> <p>19 THE COURT: You mean good cause to intervene late?</p> <p>20 MR. DALY: Well, I think late and at all. I mean,</p> <p>21 the problem here is that the stuff that -- they came to the</p> <p>22 court and they --</p> <p>23 THE COURT: They have good cause to intervene, but</p> <p>24 you're saying if -- they had it ten years ago, so why does it</p> <p>25 matter that it's ten years later?</p>	<p style="text-align: right;">13</p> <p>1 MR. DALY: That's one of our arguments, yes,</p> <p>2 Judge. And I also think that we do have this metaphysical</p> <p>3 problem of, what are they intervening in? There is no</p> <p>4 Aciclovir claim for them to intervene on. If they want to</p> <p>5 sue us, "they," if the government wants to sue Abbott for</p> <p>6 Aciclovir, they can bring it under 3730(a), which is the</p> <p>7 direct action.</p> <p>8 THE COURT: Right, and it gives them a year.</p> <p>9 MR. DALY: It gives them six years.</p> <p>10 THE COURT: No, I understand. It gives them --</p> <p>11 MR. DALY: Six years from today, or from whenever</p> <p>12 they filed it in June.</p> <p>13 THE COURT: Right, and you said that simply means a</p> <p>14 year of recovery, right?</p> <p>15 MR. DALY: Well, because they allege in their</p> <p>16 complaint that the alleged scheme ended in April of 2001, so</p> <p>17 it effectively does that. But that's their option at this</p> <p>18 point, and I don't think you can sort of resurrect claims</p> <p>19 that have been abandoned and call it an intervention.</p> <p>20 THE COURT: I don't know, so why don't I turn to</p> <p>21 you and ask. This is a mess procedurally, okay? So let me</p> <p>22 just start you from point one, which is, you can't say that</p> <p>23 you can relate back and not say that the complaint in</p> <p>24 intervention is tantamount to an amended complaint. You just</p> <p>25 can't have it both ways. If it's a brand-new complaint, then</p>

<p style="text-align: right;">14</p> <p>1 it doesn't relate back. I mean, you can't have your cake and</p> <p>2 eat it too on the procedural argument. So I bought your</p> <p>3 argument essentially that it was essentially an amended</p> <p>4 complaint and it relates back under the first prong.</p> <p>5 MR. GOBENA: 15(c)(1).</p> <p>6 THE COURT: 15(c)(1). So you need to move to</p> <p>7 amend, and I'll say that from now on, because this whole area</p> <p>8 has suddenly turned into a mess.</p> <p>9 MR. GOBENA: Sure.</p> <p>10 THE COURT: So now the part that I was struggling</p> <p>11 with last night is, the statute says you have to have written</p> <p>12 consent of the Attorney General, but you guys just sat by</p> <p>13 while they dropped it. What do I do with that? He's</p> <p>14 technically correct, there's nothing to intervene in. Do I,</p> <p>15 like, just like Lazarus. . . emerging? I'm not blaming you</p> <p>16 personally. It is messy.</p> <p>17 MR. GOBENA: I understand your Honor's concern, and</p> <p>18 I think the key is that there is a distinction between, I</p> <p>19 think, essentially dropping something and dismissing</p> <p>20 something. I mean, FCA claims can only be dealt with if</p> <p>21 they're dismissed. You can't just abandon them.</p> <p>22 THE COURT: He dismissed it, didn't he?</p> <p>23 MR. GOBENA: No. What he did was, he adopted the</p> <p>24 United States' complaint in intervention as the relator's</p> <p>25 complaint; didn't move to dismiss it; just asked for the</p>	<p style="text-align: right;">16</p> <p>1 THE COURT: So they amended by adding maybe. So</p> <p>2 they didn't actually dismiss their complaint?</p> <p>3 MR. DALY: They amended it by dropping everything</p> <p>4 that they had that wasn't -- they simply adopted as their</p> <p>5 complaint the government's complaint, and whatever they</p> <p>6 had --</p> <p>7 THE COURT: Didn't they technically dismiss out</p> <p>8 their --</p> <p>9 MR. DALY: I don't think it was a motion to</p> <p>10 dismiss, Judge, no.</p> <p>11 THE COURT: It's a disaster.</p> <p>12 MR. DALY: One thing I will point out is, the</p> <p>13 statute says dismiss "actions" without consent, not</p> <p>14 "claims." The action hasn't been dismissed, but I don't</p> <p>15 think there's any prohibition on dismissing claims without</p> <p>16 the Attorney General's consent.</p> <p>17 THE COURT: A new argument you must have just</p> <p>18 thought of.</p> <p>19 MR. DALY: Well, I meant to say it, Judge, but I</p> <p>20 moved on.</p> <p>21 MR. GOBENA: Of course, the United States believes</p> <p>22 that's drawing too fine a line between what the statute was</p> <p>23 really trying to get at. I mean, the issue is that, and this</p> <p>24 will be made very clear --</p> <p>25 THE COURT: Are there any cases on this at all in</p>
<p style="text-align: right;">15</p> <p>1 Court to allow for an amendment to adopt the United States'</p> <p>2 complaint, so --</p> <p>3 THE COURT: Did somebody allow his motion to</p> <p>4 dismiss?</p> <p>5 MR. GOBENA: The court did.</p> <p>6 THE COURT: Is that me?</p> <p>7 MR. GOBENA: No, not you. It was Judge Gold down</p> <p>8 in Florida.</p> <p>9 THE COURT: Right, so they were dismissed. So, I</p> <p>10 mean, he's technically correct, there's nothing to intervene</p> <p>11 in.</p> <p>12 MR. GOBENA: Well, it wasn't a motion to dismiss,</p> <p>13 your Honor, and that's the thing. They didn't ask to have</p> <p>14 their claims eliminated. All they asked to do is to adopt</p> <p>15 the United States' complaint by amendment.</p> <p>16 THE COURT: So they did move to dismiss down there?</p> <p>17 MR. GOBENA: No. There's no motion to dismiss, and</p> <p>18 certainly if there's a motion to dismiss, the United</p> <p>19 States --</p> <p>20 THE COURT: Do you agree with that, there's no</p> <p>21 motion -- that the claims haven't been dismissed?</p> <p>22 MR. DALY: No, I don't. There's no "motion to</p> <p>23 dismiss," but they amended by adopting. So whatever I had</p> <p>24 before I don't have because I'm jumping in with the United</p> <p>25 States on their complaint.</p>	<p style="text-align: right;">17</p> <p>1 the United States of America?</p> <p>2 MR. GOBENA: No, not specifically, but there's some</p> <p>3 general case law that I think guides the Court. I mean,</p> <p>4 there's a Sixth Circuit decision, U.S. Ex Rel Taxpayers</p> <p>5 Against Fraud V. General Electric; and one of the things the</p> <p>6 court said there, and admittedly it's in dicta, is that the</p> <p>7 False Claims Act has been crafted in such a way with such</p> <p>8 particular care as to give the United States primacy when it</p> <p>9 comes to overseeing the prosecution of False Claims Act</p> <p>10 claims, regardless of whether it brings it itself or the</p> <p>11 relator brings it.</p> <p>12 So when you look at sort of where all the courts</p> <p>13 are going in terms of the United States' control over False</p> <p>14 Claims Act action, the only logical conclusion is that you</p> <p>15 have to read the statute on the basis of its plain meaning.</p> <p>16 And Congress intended both the court and the United States to</p> <p>17 get (Inaudible) consent to dismissal. If the relator then</p> <p>18 decided to move to dismiss, we certainly would have</p> <p>19 considered the motion and done whatever was appropriate based</p> <p>20 on our evaluation of the motion and the claims, but we</p> <p>21 weren't presented with that situation.</p> <p>22 And just to go back a moment, I don't want to waste</p> <p>23 the Court's time too much on this, but on the issue of</p> <p>24 Aciclovir, we had allegations in 1997 from the relator about</p> <p>25 Aciclovir. It's a mega-spread drug. It's a drug with</p>

<p style="text-align: right;">18</p> <p>1 spreads, I think eventually over a thousand percent. And we</p> <p>2 had allegations from one customer, particularly the relator,</p> <p>3 who claimed that Abbott's salespeople were marketing the</p> <p>4 spreads to them. And we didn't intervene at that time</p> <p>5 because we wanted to get some verification in discovery, and</p> <p>6 in the course of discovery we took a deposition of the</p> <p>7 salesperson who was alleged to have done it, and he confirmed</p> <p>8 he talked about AWP's with the relator. And to talk about</p> <p>9 AWP's is the functional equivalent of talking about the</p> <p>10 spreads, so that's the new --</p> <p>11 THE COURT: Why did it take ten years?</p> <p>12 MR. GOBENA: Are you talking sort the macro sense</p> <p>13 to investigate the cases or with respect to this particular</p> <p>14 drug?</p> <p>15 THE COURT: This case.</p> <p>16 MR. GOBENA: Well, to be honest with you, I can't</p> <p>17 give you the history beyond 2004 because I wasn't on the</p> <p>18 case. So all I can do is roll it up in the larger issue,</p> <p>19 which is, you know, when these cases were brought in Florida,</p> <p>20 there were some thirty or forty defendants out there, and</p> <p>21 tens of thousands of NDCs are being investigated, and the</p> <p>22 government did its best with the limited resource it had to</p> <p>23 sort through defendants. And over time, we've settled</p> <p>24 cases. There's been over a half a million dollars' worth of</p> <p>25 settlements in these Ven-A-Care cases, and we've intervened</p>	<p style="text-align: right;">20</p> <p>1 marketing it. This was a very powerful antiviral drug. It's</p> <p>2 used to treat AIDS patients. I mean, it's not a drug that --</p> <p>3 you know, it's not just the typical generic out there. It</p> <p>4 was generic. However, it served an important function, so I</p> <p>5 think that the, you know, the sort of justice weighs in favor</p> <p>6 of allowing us to have this amendment to add a drug.</p> <p>7 THE COURT: Going back to his point, assume you're</p> <p>8 absolutely correct --</p> <p>9 MR. GOBENA: With respect to the consent?</p> <p>10 THE COURT: -- that you need the written consent of</p> <p>11 the Attorney General, and they didn't get it, but still</p> <p>12 there's nothing there right now to intervene in. So what</p> <p>13 does one do?</p> <p>14 MR. GOBENA: Oh, I argue, your Honor, that there</p> <p>15 actually is something there to intervene in, which is that,</p> <p>16 you know, while the relator may have a Fifth Amendment</p> <p>17 complaint that adopts the United States' complaint in</p> <p>18 intervention, it didn't dismiss, you know, the NDCs and</p> <p>19 claims that are identified in this fourth amended complaint.</p> <p>20 THE COURT: You never actually, is that correct,</p> <p>21 you never actually dismissed it?</p> <p>22 MR. BREEN: That's correct, your Honor.</p> <p>23 MR. GOBENA: So there really are --</p> <p>24 THE COURT: Do I have it somewhere?</p> <p>25 MR. GOBENA: You might have it as an exhibit to the</p>
<p style="text-align: right;">19</p> <p>1 in some, and we've dismissed a bunch actually. So we do</p> <p>2 actually dismiss cases when it makes sense to do so.</p> <p>3 So why it took ten years specifically about</p> <p>4 Aciclovir? I can't tell you, but I can tell you sort of</p> <p>5 generally why this case has taken so long. And one of the</p> <p>6 difficulties we've had, your Honor, is that, you know, we</p> <p>7 issued investigative subpoenas in these cases back in 19 --</p> <p>8 THE COURT: -- the only reason it took you ten</p> <p>9 years to get the confirmation of the positions is because it</p> <p>10 took you that long to notice the depositions.</p> <p>11 MR. GOBENA: Fair enough.</p> <p>12 THE COURT: As I understand it. It's not your</p> <p>13 typical newly discovered evidence.</p> <p>14 MR. GOBENA: Right, I think that's right. I mean,</p> <p>15 but -- well, we (Inaudible) the ability to compel testimony,</p> <p>16 sworn testimony about -- well, I guess we did under civil</p> <p>17 investigative demand provisions, but, you know, obviously we</p> <p>18 took the route of getting the sworn testimony through</p> <p>19 litigation. And the ten years is a function of the fact that</p> <p>20 the investigation was complex. It involved many more</p> <p>21 defendants than Abbott. So it's unfortunately why it took so</p> <p>22 long.</p> <p>23 However, I don't think it outweighs the fact that</p> <p>24 we're talking about a mega-spread drug. We're talking about</p> <p>25 the fact that their salespeople were going out there and</p>	<p style="text-align: right;">21</p> <p>1 motion.</p> <p>2 MR. DALY: Judge, the relator's motion is Exhibit K</p> <p>3 to our original motion to dismiss here, and then Judge Gold's</p> <p>4 order is Exhibit L.</p> <p>5 THE COURT: I think we have it all upstairs. So</p> <p>6 your argument would be, even because they adopted it, it</p> <p>7 doesn't mean they dismissed their own claims?</p> <p>8 MR. GOBENA: I think that's correct. They have to</p> <p>9 move the Court to dismiss it. I mean, the statute talks</p> <p>10 about dismissal. It didn't talk about dropping or</p> <p>11 abandonment. I don't think abandonment or dropping is</p> <p>12 sufficient to meet the statute's requirements in terms of the</p> <p>13 disposal of a claim. So as a result, there very well are,</p> <p>14 you know, these NDCs --</p> <p>15 THE COURT: Does this mean five years from now</p> <p>16 you'll find another one of these drugs and then amend and</p> <p>17 relate it back?</p> <p>18 MR. GOBENA: Well, I think, you know, in this</p> <p>19 instance here, what we were trying to do is, we thought we</p> <p>20 were allowed to move and amend as a matter of right under</p> <p>21 15(a), and I understand the Court's decision about that.</p> <p>22 THE COURT: So you're going to have to move to</p> <p>23 amend.</p> <p>24 MR. GOBENA: We'd have to move to amend, and then</p> <p>25 the Court would have to make a decision at that point,</p>

<p style="text-align: right;">22</p> <p>1 weighing a variety of factors, as to whether or not it was</p> <p>2 appropriate to do the amendment. So there is, you know, a</p> <p>3 doorstep on this, and that's the Court's discretion and the</p> <p>4 Court's authority to decide not to grant a motion to amend</p> <p>5 down the road, although I will note that we only have two</p> <p>6 months of fact discovery left, so our ability to --</p> <p>7 THE COURT: What do you do with his point, which is</p> <p>8 he has to go back through and do all this discovery again?</p> <p>9 Because, I mean, I will do a typical Rule 15 kind of</p> <p>10 balancing.</p> <p>11 MR. GOBENA: Yes, well, one thing is that we put</p> <p>12 them on notice, I believe as of June, with six months left in</p> <p>13 the discovery period, that we were interested in pursuing</p> <p>14 this drug. And I actually personally sent a request for</p> <p>15 documents related to Aciclovir. They've decided not to</p> <p>16 produce it. I don't know if they're gathering it or not. On</p> <p>17 the government's side, we're trying to do our best to</p> <p>18 gather --</p> <p>19 THE COURT: Does that mean you have to go back and</p> <p>20 depose all these people all over again?</p> <p>21 MR. GOBENA: Well, not necessarily. If you're</p> <p>22 talking about their depositions of government people,</p> <p>23 frankly, from what I've seen, and, again, in my</p> <p>24 representation to the Court, they don't really ask</p> <p>25 drug-specific questions. Most of their defense is built on</p>	<p style="text-align: right;">24</p> <p>1 careful about what we do.</p> <p>2 THE COURT: Are they in different locations and in</p> <p>3 Washington? Where are they?</p> <p>4 MR. DALY: Some are in Washington. They've tended</p> <p>5 to be in various places because a lot of people have</p> <p>6 retired. Remember, some of these events are from the early</p> <p>7 to mid-'90s, so people have left the government, are in other</p> <p>8 positions or retired at this point in time, but by and large,</p> <p>9 we've been able to get them in D.C.</p> <p>10 MR. GOBENA: Your Honor, if I could address that,</p> <p>11 first of all, the amount of utilization for Aciclovir from</p> <p>12 '97 to 2001, we're talking, I think, about \$400,000 or</p> <p>13 \$500,000 here. It's not a huge utilization drug.</p> <p>14 Secondly, there's no J-Code for this drug, and</p> <p>15 that's because there wasn't a lot of significant Medicare</p> <p>16 utilization. I think our damages for Aciclovir are going to</p> <p>17 be Medicaid damages, and thus far they've only deposed a</p> <p>18 handful of Medicaid people at CMS that I'm aware of. I don't</p> <p>19 know that they've deposed too many state Medicaid people to</p> <p>20 the extent they --</p> <p>21 THE COURT: So you're willing to pay for whatever</p> <p>22 expenses it costs to fly back and depose these people a</p> <p>23 second time?</p> <p>24 MR. GOBENA: Well, I mean, your Honor, if they've</p> <p>25 not moved to dismiss -- I think that we should be allowed to</p>
<p style="text-align: right;">23</p> <p>1 the generalized government knowledge: "You knew that there</p> <p>2 were spreads, and you still kept the system --"</p> <p>3 THE COURT: Well, let's assume I make them move --</p> <p>4 well, not assume -- I am going to require them to move to</p> <p>5 amend. What are the actual now damages caused by a delay?</p> <p>6 MR. DALY: Well, these two drugs are, you know,</p> <p>7 drugs that have a lot of sales, they have a lot of data, a</p> <p>8 lot of information, a lot of people that they want to</p> <p>9 depose. We obviously need to find out what the federal</p> <p>10 government knew about these drugs. One of the things that</p> <p>11 the government has, the position that they've taken in</p> <p>12 discovery is, "Gee, if it doesn't mention one of your drugs</p> <p>13 that we've sued you on, the subject drugs, we're not giving</p> <p>14 you the documents." So as far as we know, they could have a</p> <p>15 treasurer trough of documents relating to Aciclovir, and we</p> <p>16 don't have them. Obviously, we have to ask for that.</p> <p>17 THE COURT: That's just additional time to do it,</p> <p>18 but what are the actual dollar damages from having to go</p> <p>19 redepose people?</p> <p>20 MR. DALY: Well, if we had to do that, it would be,</p> <p>21 you know, it's certainly tens of thousands of dollars.</p> <p>22 THE COURT: Why?</p> <p>23 MR. DALY: Well, because we've taken probably</p> <p>24 forty, fifty depositions per side thus far. I'm not saying</p> <p>25 we'd want to go back and do them all, but I think we would be</p>	<p style="text-align: right;">25</p> <p>1 add the drugs based on the conduct at issue. I don't think</p> <p>2 we should have to pay their fees in connection with it</p> <p>3 because the conduct is so egregious that we have to seek</p> <p>4 damages for (Inaudible) --</p> <p>5 THE COURT: At some point the government has got to</p> <p>6 eat it. I mean, they've got to make a decision in terms</p> <p>7 of -- you know, I'm sympathetic that these are massive</p> <p>8 spreads and a huge amount of time. It's just, you know, now</p> <p>9 we're almost at the tail end of discovery. He has to go back</p> <p>10 and depose some of these people if I allow it, and the</p> <p>11 government should have to pay for whatever the actual -- not</p> <p>12 the time in the deposition because that would have happened</p> <p>13 if you'd done it in a timely way, but different travel</p> <p>14 expenses and that sort of thing.</p> <p>15 Where's your firm, Mr. Daly?</p> <p>16 MR. DALY: Primarily in Chicago, although we've got</p> <p>17 folks in Washington working on it as well.</p> <p>18 THE COURT: The depositions are where?</p> <p>19 MR. GOBENA: Well, I mean, the thing is, I don't</p> <p>20 even know who you're anticipating deposing, Mr. Daly,</p> <p>21 because, quite frankly, your Honor, as I mentioned, none of</p> <p>22 these CMS witnesses, I mean, at best a few of them that</p> <p>23 they've deposed thus far really know anything about Medicaid</p> <p>24 programs.</p> <p>25 THE COURT: Oh, so it may be a very small amount of</p>

<p style="text-align: right;">26</p> <p>1 money.</p> <p>2 MR. GOBENA: Exactly. I mean, I think what we need</p> <p>3 to do is assess, you know, really the impact first before</p> <p>4 that kind of sanction is imposed on the government for</p> <p>5 amending the complaint.</p> <p>6 THE COURT: It's not a sanction. It's a condition</p> <p>7 for amending so late, like, two months left of the discovery</p> <p>8 period. I mean, it's a typical thing that you impose on</p> <p>9 parties.</p> <p>10 MR. GOBENA: Well, your Honor, when we sought to</p> <p>11 amend, there was six months left in discovery, and we filed</p> <p>12 our first amended complaint in June. Two months was because</p> <p>13 we --</p> <p>14 THE COURT: You didn't have the right to just file</p> <p>15 it because you needed to move to amend, and it just --</p> <p>16 So I think what Mr. Daly needs to do, because he</p> <p>17 talked in very general terms about his prejudice without</p> <p>18 being specific, what I'd be inclined to do is to allow the</p> <p>19 motion to amend when it's filed. In opposition, you should</p> <p>20 essentially detail any additional expenses. I'm not talking</p> <p>21 about attorneys' fees because if he had done it in a timely</p> <p>22 way, you would have had to actually have done the deposition</p> <p>23 anyway, but any additional cost from traveling from Chicago</p> <p>24 to Washington or an additional hotel room and the like. And</p> <p>25 I want to know, are any more of these things coming?</p>	<p style="text-align: right;">28</p> <p>1 that when the Court makes its decision on the motion to</p> <p>2 dismiss, if it could order the answer to be served by Abbott</p> <p>3 within a week of the Court's order.</p> <p>4 THE COURT: How many paragraphs?</p> <p>5 MR. GOBENA: In our complaint? I think it's 130.</p> <p>6 THE COURT: I don't know that you can do it in a</p> <p>7 week.</p> <p>8 MR. GOBENA: Well, I mean, the only issue I have,</p> <p>9 your Honor, is that there may be affirmative defenses in</p> <p>10 there that we're going to need to do discovery on, and we're</p> <p>11 going to run out of time.</p> <p>12 THE COURT: He just told you what they were.</p> <p>13 MR. GOBENA: Well, in general terms. I've seen</p> <p>14 their answers in other cases, and they have 60 plus</p> <p>15 affirmative defenses listed out there, so it's not, like,</p> <p>16 that simple as he characterized it.</p> <p>17 THE COURT: When can you give them a draft answer</p> <p>18 so they'll know what your likely affirmative defense is?</p> <p>19 MR. DALY: I mean, I could provide them something,</p> <p>20 Judge, that will give them a foreshadowing of what they will</p> <p>21 be. Perhaps a letter, would that be all right, Judge?</p> <p>22 THE COURT: Yes. When can you file your motion to</p> <p>23 amend?</p> <p>24 MR. GOBENA: We can do that by the end of this</p> <p>25 week.</p>
<p style="text-align: right;">27</p> <p>1 MR. GOBENA: In terms of Abbott claims, claims</p> <p>2 against Abbott? As far as I know, I think that's it, based</p> <p>3 on the evidence we have at hand. Again, discovery has two</p> <p>4 months left. I don't anticipate anything, but I'm not sure</p> <p>5 in terms of adding additional drugs.</p> <p>6 THE COURT: Now, what's coming in two months,</p> <p>7 expert discovery?</p> <p>8 MR. GOBENA: Yes, expert discovery starts at that</p> <p>9 stage, although, your Honor, I would like to point out to the</p> <p>10 Court, I want to give the Court advanced notice, we're two</p> <p>11 months away from the end of discovery. We haven't received</p> <p>12 an answer from Abbott. So we can guess at what their</p> <p>13 defenses are going to be, but we haven't gotten --</p> <p>14 THE COURT: When are you going to file an answer?</p> <p>15 MR. DALY: Well, if the Court were to grant my</p> <p>16 motion to dismiss, I'd never have to file an answer.</p> <p>17 THE COURT: Well, you would on the other claims.</p> <p>18 MR. DALY: As soon as the Court rules, because</p> <p>19 right now our current motion is addressed to the entire</p> <p>20 thing.</p> <p>21 THE COURT: What are your defenses?</p> <p>22 MR. DALY: A, we didn't do it, and, B, they knew</p> <p>23 about it and it was part of the system.</p> <p>24 THE COURT: So now you know.</p> <p>25 MR. GOBENA: I guess what I'm asking the Court is</p>	<p style="text-align: right;">29</p> <p>1 THE COURT: Fine. And you're going to respond</p> <p>2 within a week, because I've got most of it here in these</p> <p>3 massive filings, as to what any prejudice would be. I have</p> <p>4 to look at your -- see what you technically did here to see</p> <p>5 if there are any claims to still intervene in, if there was</p> <p>6 an actual dismissal as opposed to just an adoption. You're</p> <p>7 saying, as you see it, you remember you didn't actually</p> <p>8 dismiss the --</p> <p>9 MR. BREEN: Your Honor, we didn't, and just for</p> <p>10 what it's worth, and granted this is a complicated case, a</p> <p>11 complicated situation, there's a lot of first decisions here,</p> <p>12 but here's how I see it: We pled a claim. We pled a cause</p> <p>13 of action under the False Claims Act. These Aciclovir</p> <p>14 allegations, we think they're allegations. We believe it was</p> <p>15 the right thing to do to join the government's complaint to</p> <p>16 simplify this case and not proceed on every possible NDC that</p> <p>17 the relator had developed information on. But these</p> <p>18 Aciclovir claims are allegations; and to the extent that</p> <p>19 those allegations are not in the current complaint, it's not</p> <p>20 as if we dismissed or abandoned the cause of action. They're</p> <p>21 the same division, the same people, the same marketing</p> <p>22 mechanisms. We're not talking about there are other</p> <p>23 divisions and other drugs.</p> <p>24 And I never looked at these as being a cause of</p> <p>25 action or something to be dismissed. I looked at this as</p>

<p style="text-align: right;">30</p> <p>1 streamlining our case, joining in the government's complaint, 2 and making it simpler for everybody. But just like any other 3 allegations that are still there that relate to our cause of 4 action, to the extent that they're a proper subject to 5 amendment, everything relates back. 6 THE COURT: It's a mess. 7 MR. BREEN: It's not like we're trying to bring a 8 new theory or a new cause of action. 9 THE COURT: Did you ever actually dismiss your 10 allegations involving this? 11 MR. BREEN: No, your Honor, absolutely not. 12 THE COURT: I'm going to have to go upstairs and 13 look. Was it a motion to substitute? 14 MR. BREEN: It was a motion for leave to amend by 15 adopting the government's complaint in intervention. 16 THE COURT: And it never says dropping the other 17 claim? 18 MR. BREEN: I don't believe so, your Honor. 19 THE COURT: So let me just be clear now. Whatever 20 I do here, I'll take care, I'll protect Abbott from any 21 unnecessary expenses by flying back and taking a new 22 deposition, or whatever, but I'm not going to grant any more 23 motions to amend unless it's genuinely new evidence -- not 24 "We didn't get around to taking the deposition" -- genuine. 25 These cases have to end.</p>	<p style="text-align: right;">32</p> <p>1 here, even while they had this one in Florida. 2 THE COURT: What's PPD? 3 MR. DALY: That's our Pharmaceutical Products 4 Division, Judge. That sells sort of branded drugs. The 5 other one does the generic drugs. 6 THE COURT: So why isn't -- so that isn't part of 7 this case? 8 MR. BREEN: No, your Honor. It was just 9 transferred to the MDL recently. There's a motion to dismiss 10 filed, and it's being briefed. 11 MR. GOBENA: It's another qui tam, your Honor. 12 MR. BREEN: I'm just making full disclosure as to 13 the number of cases. 14 THE COURT: Well, what's this case about? 15 MR. GOBENA: It's another qui tam that was filed 16 here in Boston. It involves completely different drugs and a 17 different division within Abbott. The United States has 18 declined to intervene on that case, so the relator is not 19 proceeding, and I believe it's been transferred to the MDL. 20 THE COURT: I see, so it's a different division, 21 different drugs. 22 MR. GOBENA: Different division, different drugs, 23 different people selling them, different customer base. 24 THE COURT: So the new one is branded? 25 MR. BREEN: It is a branded drug, your Honor, but</p>
<p style="text-align: right;">31</p> <p>1 And what about Dey? What are all the other cases I 2 have, Roxane? All these other things, are we going to keep 3 having this problem? What are the others that are floating 4 out there? 5 MR. GOBENA: I really can't talk about it in open 6 court. 7 THE COURT: No, but the ones that have been opened. 8 MR. GOBENA: Oh, there's Dey and Roxane. 9 THE COURT: Yes, yes, right. So are you going to 10 be adding new claims onto them? 11 MR. GOBENA: Well, I can't talk to that. Laurie 12 Oberembt is here and is actually handling those two cases. 13 She could probably address that for your Honor. 14 THE COURT: Are we going to have the same problem 15 again? 16 MS. OBEREMBT: We don't have any plans to have the 17 same problem again, your Honor. 18 MR. BREEN: Your Honor, there's also a separate 19 complaint out of Boston where the relator has got -- it's a 20 nonintervene case that was recently transferred to the MDL 21 involving Abbott's PPD Division, correct. 22 MR. DALY: And that's going to be coming before 23 you, Judge, with another motion. 24 THE COURT: What? 25 MR. DALY: They filed another duplicative action</p>	<p style="text-align: right;">33</p> <p>1 they competed in the generic marketplace by marketing the 2 spread, is the nature case. 3 THE COURT: And this case here in front of me 4 mostly is generic? 5 MR. GOBENA: It's all generics, your Honor, and 6 different kind of drugs. Our drugs in this case are 7 injectable drugs. They're sold in sort of a -- 8 MR. DALY: Saline, dextrose, sugar water, salt 9 water. 10 THE COURT: So how do you deal with the median 11 pricing issue? 12 MR. GOBENA: Well, that's an issue that we're 13 evaluating right now, and, you know, we originally had -- we 14 had a couple of theories that we're going to explore with our 15 experts and ultimately probably put into our expert report, 16 one of which is to argue that while there might be -- it 17 might not be easy to show a clear line between Abbott's 18 pricing and the effect on the median, the fact is that Abbott 19 was marketing the spread on its drugs -- and we have 20 documents to this effect -- knowing that it would affect the 21 Medicaid reimbursements. And our argument is that by 22 marketing the spread on Medicaid drugs, in effect, it's 23 fraud-tainted Medicare claims because the scheme was not 24 Medicare or Medicaid specific. It was geared towards getting 25 government programs ultimately to pay for drugs. If we argue</p>

<p style="text-align: right;">34</p> <p>1 that, then I think our damages might be -- the amount of the</p> <p>2 claims is tainted by taken by kickbacks -- Medicare claims</p> <p>3 were tainted by Medicaid kickbacks.</p> <p>4 THE COURT: So it's not just a straight liquidated</p> <p>5 damage claim?</p> <p>6 MR. GOBENA: No, no. And then the other thing --</p> <p>7 THE COURT: Because unlike what I had in the other</p> <p>8 case, the False Claims Act is so much per claim. What is it?</p> <p>9 I don't even know.</p> <p>10 MR. GOBENA: The claims are \$5,500 to \$11,000.</p> <p>11 Actually, from September 15, '99, till now, and the claims</p> <p>12 before that were \$5,000 to \$10,000. You're talking about the</p> <p>13 penalties?</p> <p>14 THE COURT: Per claim.</p> <p>15 MR. GOBENA: Per claim, yes. The other theory</p> <p>16 we're looking into is just seeing the effect that Abbott's</p> <p>17 prices had on the median price and determining damages based</p> <p>18 on that, kind of akin to what your Honor was doing in the MDL</p> <p>19 case. But I think it's fair to say, in our preliminary</p> <p>20 assessment of damages, that the vast majority of damages in</p> <p>21 our case are going to come from the Medicaid side where you</p> <p>22 don't have the median problem. The drugs were reimbursed on</p> <p>23 an NDC basis based on NDC and the AWP --</p> <p>24 THE COURT: Don't you have MACs and FULs and all</p> <p>25 that stuff?</p>	<p style="text-align: right;">36</p> <p>1 claims to be hammered out in this motion in response?</p> <p>2 THE COURT: No, you don't have to rebrief that.</p> <p>3 You've already briefed that to death.</p> <p>4 MR. DALY: Okay.</p> <p>5 THE COURT: I agree with you on your first point,</p> <p>6 which is a minor victory but a victory, which is, they need</p> <p>7 to move to amend.</p> <p>8 MR. DALY: Right.</p> <p>9 THE COURT: I have to say I'm somewhat persuaded,</p> <p>10 and I need to look at the documents, that if they didn't</p> <p>11 actually dismiss their claims but simply moved to adopt the</p> <p>12 government's, that there may be something there to intervene</p> <p>13 on, but I need to read the document myself.</p> <p>14 MR. DALY: I know you will, but let me just read it</p> <p>15 to you: "Ven-A-Care moves pursuant to Rule 15, Federal Rules</p> <p>16 of Civil Procedure, for leave to amend its complaint as to</p> <p>17 Abbott only by adopting the United States' intervention</p> <p>18 complaint as Ven-A-Care's complaint against Abbott." And</p> <p>19 that's in Exhibit K to our motion to dismiss, to adopt it as</p> <p>20 Ven-A-Care's complaint against Abbott. I mean, I think if</p> <p>21 the Court were sitting here and you had two co-plaintiffs and</p> <p>22 one of them said, you know, "I'm adopting my co-plaintiff's</p> <p>23 complaint," you wouldn't be hearing from them two years</p> <p>24 later, "Oh, you know, I did that, but I've still got all</p> <p>25 these claims back here that I want to resurrect," and that's</p>
<p style="text-align: right;">35</p> <p>1 MR. GOBENA: No, actually not for -- for the most</p> <p>2 part, not for injectable drugs. If you ask me why, I can't</p> <p>3 give you an answer, even though these were generics, but you</p> <p>4 don't have a MAC or the FUL problem for the most part.</p> <p>5 THE COURT: I thought this case for the generics</p> <p>6 would be easier because I don't have to deal with any of that</p> <p>7 liquidated damage amount.</p> <p>8 MR. GOBENA: Well, no, it's more, I think, on the</p> <p>9 Medicaid side, it's a straight traditional damages theory.</p> <p>10 You're going to have AWP-based reimbursements, and you're</p> <p>11 going to have, you know, the differential between that and</p> <p>12 the actual, kind of like your brand case for Medicare.</p> <p>13 That's how it is for generics on the Medicaid side.</p> <p>14 On the Medicare side, obviously you have the issue</p> <p>15 of the median, so the damages get a little bit more</p> <p>16 complicated. But, you know, like I said, I think it's fair,</p> <p>17 we're going to have, I think, substantial Medicare damages,</p> <p>18 but this is mostly a Medicaid damages case when we're talking</p> <p>19 damages.</p> <p>20 THE COURT: Can I ask just going off the record for</p> <p>21 a minute.</p> <p>22 (Discussion off the record.)</p> <p>23 MR. DALY: Judge, I just want to understand where</p> <p>24 we are. They're going to file a motion for leave. Are we</p> <p>25 leaving the question of the relation back of the Aciclovir</p>	<p style="text-align: right;">37</p> <p>1 what we're doing today.</p> <p>2 THE COURT: It's extremely messy. It's extremely</p> <p>3 messy, and it's not clear for either of you.</p> <p>4 MR. DALY: Judge, we have -- and I appreciate the</p> <p>5 Court's time today -- we have a sort of second phase of our</p> <p>6 argument, which is --</p> <p>7 THE COURT: The NDCs.</p> <p>8 MR. DALY: For all of them. And, you know, really</p> <p>9 it's a question of Exhibit A, if I may hand this up to the</p> <p>10 Court, which is --</p> <p>11 THE COURT: You know, I feel less sympathetic to</p> <p>12 you when it's just, like, well, they mentioned one drug NDC</p> <p>13 but not the other drug NDC, because all NDC means is</p> <p>14 different amounts or how many milligrams in the dose.</p> <p>15 MR. DALY: Well, I mean, here's my problem with</p> <p>16 that: Some of them are new drugs; some of them were added at</p> <p>17 different points in time. And I think the Court has made a</p> <p>18 variety of observations in various contexts that, you know,</p> <p>19 if I've learned anything in these cases, it's drug by drug,</p> <p>20 NDC by NDC. And our first point here is under Baylor. I'm</p> <p>21 not going to reargue the Baylor motion that you did in Dey,</p> <p>22 but what's it going to relate back to? It ought to at least</p> <p>23 relate back to the first time that something was raised.</p> <p>24 Otherwise --</p> <p>25 THE COURT: The drug, the drug.</p>

<p style="text-align: right;">38</p> <p>1 MR. DALY: The drug.</p> <p>2 THE COURT: But not necessarily each NDC. That's</p> <p>3 slicing it too thin. I forget, there was another case where</p> <p>4 I didn't buy that argument, I don't remember which one it</p> <p>5 was, but you've got notice that this drug and this marketing</p> <p>6 with this drug; and if they didn't mention one NDC as opposed</p> <p>7 to another NDC, as long as it's the same drug, you've got</p> <p>8 fair notice of the claim.</p> <p>9 MR. DALY: Well, but there's quite a few in here,</p> <p>10 Judge, that are different drugs, completely different drugs.</p> <p>11 THE COURT: Completely new drugs?</p> <p>12 MR. DALY: Completely new drugs. If you look at</p> <p>13 Exhibit A, for example --</p> <p>14 THE COURT: What's a completely new drug?</p> <p>15 MR. DALY: When the government filed its first</p> <p>16 complaint, the one that was transferred to your Honor, if you</p> <p>17 look at the last page of this, Page 6 -- well, these are the</p> <p>18 ones, Judge, these are all J-Code drugs, and they had never</p> <p>19 been mentioned by anybody in any prior complaint.</p> <p>20 THE COURT: So the last four, is that the ones that</p> <p>21 are brand-new?</p> <p>22 MR. DALY: Yes. Yes, and that's important to us.</p> <p>23 And the one point I want to raise is --</p> <p>24 THE COURT: Wait. Is that right, they've never</p> <p>25 been mentioned in any drug, in any --</p>	<p style="text-align: right;">40</p> <p>1 the Food and Drug Administration, and every one of these</p> <p>2 compounds and sizes and drugs -- you know this, Judge. And</p> <p>3 then the J-Codes are a group of those that are the same drug</p> <p>4 basically.</p> <p>5 THE COURT: It's a billing mechanism.</p> <p>6 MR. BREEN: Correct.</p> <p>7 THE COURT: J-Code is a billing mechanism, but if</p> <p>8 it's same drug, were the complaints -- were any new drugs</p> <p>9 alleged?</p> <p>10 MR. BREEN: For example, the Aciclovir was alleged</p> <p>11 in the '97 complaint.</p> <p>12 THE COURT: I'm asking, are there any new ones?</p> <p>13 MR. GOBENA: In the United States' either complaint</p> <p>14 or first amended complaint? All the drugs were either in the</p> <p>15 original complaint or are in the relator's second amended</p> <p>16 complaint which was filed by August 12, 1997.</p> <p>17 THE COURT: Is that right, and we have different</p> <p>18 billing codes and different NDCs codes?</p> <p>19 MR. DALY: Well, there are different NDCs, but</p> <p>20 there are different NDCs for a reason, Judge. I mean, not</p> <p>21 all saline products are the same. They're different drugs</p> <p>22 used for different purposes in different areas and different</p> <p>23 parts of the hospitals for different procedures. The same</p> <p>24 thing for Vanco, the same thing for sugar water. To claim,</p> <p>25 to say that all salines are the same, and if I sued you for</p>
<p style="text-align: right;">39</p> <p>1 MR. BREEN: It's not right, your Honor. The J-Code</p> <p>2 nomenclature may have been new when we got into whatever</p> <p>3 amended complaint you're referring to, Jim, but the NDCs that</p> <p>4 those drugs relate to were part of the prior complaints. The</p> <p>5 drugs were alleged. It's the J-Coding itself --</p> <p>6 THE COURT: So what's an HCPCS?</p> <p>7 MR. BREEN: That's the HCPCS code, your Honor.</p> <p>8 That's J-Code.</p> <p>9 THE COURT: I know a lot now, but HCPCS is the same</p> <p>10 as J-Code?</p> <p>11 MR. GOBENA: Yes, your Honor. J-Code is a type of</p> <p>12 HCPCS code.</p> <p>13 THE COURT: So NaCl, is that salt?</p> <p>14 MR. BREEN: Salt.</p> <p>15 THE COURT: So that had been mentioned before?</p> <p>16 MR. BREEN: The NDC had, your Honor.</p> <p>17 THE COURT: Huh?</p> <p>18 MR. DALY: This isn't an NDC, though. That's my</p> <p>19 point. These are J-Codes. This is a whole new --</p> <p>20 THE COURT: I know, but is it the same drug?</p> <p>21 MR. BREEN: The same drug.</p> <p>22 MR. DALY: It's a different form of salt water or</p> <p>23 sugar water.</p> <p>24 MR. BREEN: It's not a different form, your Honor.</p> <p>25 It's a different code. The National Drug Code is issued by</p>	<p style="text-align: right;">41</p> <p>1 saline, I can come in and sue you fifteen or twelve years</p> <p>2 later --</p> <p>3 THE COURT: But you haven't shown me that there's</p> <p>4 any difference. I mean, in other words, like, I can't</p> <p>5 remember now but -- I just tried this thing a year ago, but</p> <p>6 you would have the same drug that would be sold in different</p> <p>7 dosage amounts, and each one had a different NDC, but it was</p> <p>8 the same drug.</p> <p>9 MR. DALY: Well, that's what I'm trying to say,</p> <p>10 that they're not quite the same. I mean, you have topical</p> <p>11 solutions, you have injectables, you have bags. You have all</p> <p>12 sorts of different things.</p> <p>13 THE COURT: Some are pills, I understand, but it's</p> <p>14 the same compound.</p> <p>15 MR. DALY: Right.</p> <p>16 MR. GOBENA: Chemically equivalent, your Honor.</p> <p>17 THE COURT: Whatever it is, it's the same -- I</p> <p>18 don't know, I haven't been --</p> <p>19 MR. DALY: But my point with those is that those</p> <p>20 were never named in any complaint that the relator ever filed</p> <p>21 in the ten years prior to the government's intervention,</p> <p>22 so --</p> <p>23 THE COURT: When you say "those," you mean the</p> <p>24 NDCs?</p> <p>25 MR. DALY: These last three, the J-Codes that are</p>

<p style="text-align: right;">42</p> <p>1 involved here on the very last page.</p> <p>2 THE COURT: But were the drugs that the billing</p> <p>3 codes relate to named?</p> <p>4 MR. GOBENA: Yes.</p> <p>5 MR. DALY: Sugar water was named, one form of sugar</p> <p>6 water or another was named in a prior complaint. My point</p> <p>7 is, though, these suits are about NDCs and about drugs and</p> <p>8 about specific payments made for specific drugs, not for salt</p> <p>9 water generally. And if the government is intervening in</p> <p>10 March of '06, they have to be intervening on claims that were</p> <p>11 there to intervene on. And if there were no claims by the</p> <p>12 relator on these, what is the government intervening on? The</p> <p>13 government doesn't --</p> <p>14 THE COURT: I understand that argument, and that's</p> <p>15 the one that I'm still baffled by, which is what to do with</p> <p>16 what you did way back when. And I must say, the concern I</p> <p>17 have is, the default goes to the statute, and the statute</p> <p>18 says "written consent of the Attorney General." So let's say</p> <p>19 somebody drops something and you don't have written consent</p> <p>20 of the Attorney General, what's the remedy?</p> <p>21 MR. DALY: Judge, I think when you look at these</p> <p>22 orders and see what was moved and that they moved together on</p> <p>23 this, and that one the government opened up and permitted the</p> <p>24 relator to come in and join their complaint as their</p> <p>25 complaint, I don't know how much, other than somebody writing</p>	<p style="text-align: right;">44</p> <p>1 of Justice -- I've been beating a drum, not with you but</p> <p>2 forever up here in Boston -- it's got to happen faster and</p> <p>3 cleaner.</p> <p>4 MR. GOBENA: In terms of the interventions? Oh,</p> <p>5 absolutely. This is a unique case, your Honor. I mean --</p> <p>6 THE COURT: No, it isn't. That's the sad piece of</p> <p>7 it. I totally understand Judge Jacobs' frustration in the</p> <p>8 Second, and I've had a bunch of them up here too. So it's</p> <p>9 something that I understand hugely about the resource</p> <p>10 limitations, and how you don't get the FBI time and all that,</p> <p>11 big drugs and you're fighting over very difficult issues, but</p> <p>12 it can't be ten years. These are the kinds of issues that we</p> <p>13 run into. And I guarantee you that short of genuinely newly</p> <p>14 discovered evidence, I will not be allowing any other motions</p> <p>15 to amend.</p> <p>16 MR. GOBENA: We understand, your Honor. I mean,</p> <p>17 obviously our preference would have been to have the</p> <p>18 intervention done sooner, earlier in the process because, you</p> <p>19 know, I've deposed people, or even that I've seen, I don't</p> <p>20 know answers coming back at me. So I certainly understand</p> <p>21 the Court's concern, and I think it's certainly the intention</p> <p>22 of the Department's attorneys to move as quickly as</p> <p>23 possible. This is a unique situation that was governed by</p> <p>24 the number of of defendants we had to investigate, and,</p> <p>25 frankly, some obstinate practices on the part of the</p>
<p style="text-align: right;">43</p> <p>1 a letter saying, "I hereby consent," I mean, that would be</p> <p>2 consent in any other context.</p> <p>3 THE COURT: Does it say "express consent in</p> <p>4 writing"? It says the word "express"?</p> <p>5 MR. GOBENA: I think it says "written consent" for</p> <p>6 certain. I'm not sure about the "express" part. However, I</p> <p>7 think that's the intent of the statute. Basically the</p> <p>8 statute wants both the Court and the United States, the</p> <p>9 Attorney General specifically, to weigh in on the disposal of</p> <p>10 False Claims Act claims.</p> <p>11 MR. DALY: But when the Court looks at this, and I</p> <p>12 know it will, it does talk about dismissal of actions, not</p> <p>13 the dismissal of claims. So I think that people can deal</p> <p>14 with claims, but, you know, I think what's being dealt with</p> <p>15 in the statute is: Don't make this thing go away without</p> <p>16 telling me. And that didn't happen here. They did this</p> <p>17 together. They opened it up, adopted each other, and sent it</p> <p>18 up here to your Honor.</p> <p>19 THE COURT: Well, it's a mess, and I hope I don't</p> <p>20 have to do one of these again. Are you cleaning up</p> <p>21 internally in the Department of Justice?</p> <p>22 MR. GOBENA: Your Honor, you know, not to dump on</p> <p>23 my colleague here, all we did, we intervened on the drugs we</p> <p>24 intended to intervene on, and we're proceeding with them.</p> <p>25 THE COURT: I'm just simply saying, the Department</p>	<p style="text-align: right;">45</p> <p>1 defendants when it came to responding to document subpoenas,</p> <p>2 Abbott being one of them.</p> <p>3 MR. DALY: Judge, there is just one tiny point I</p> <p>4 want to make on the relation back because I know I'm not</p> <p>5 going to have a chance to do it later.</p> <p>6 THE COURT: Yes, just one second.</p> <p>7 MR. DALY: On the Baylor case, the Court when you</p> <p>8 did the Dey decision, you said, you know, there might be</p> <p>9 circumstances where Baylor might apply if the delay caused</p> <p>10 such prejudice that it gets to almost a due process</p> <p>11 constitutional. That's the Baylor issue we're raising for</p> <p>12 your Honor when you get to that part of the relation back,</p> <p>13 which is --</p> <p>14 THE COURT: Yes, but you didn't really show that.</p> <p>15 MR. DALY: Oh, but we did, Judge. We detailed it</p> <p>16 time and time again. All of their witnesses are saying</p> <p>17 either, "I don't remember," or, "I wish I had my documents</p> <p>18 that I just told you are destroyed."</p> <p>19 THE COURT: But they haven't shown me what they</p> <p>20 would have remembered that would have made a difference.</p> <p>21 MR. DALY: All of the questions that we asked them,</p> <p>22 I mean, their witnesses, they had -- the government did not</p> <p>23 issue a hold memo until 2007 in this case.</p> <p>24 THE COURT: A what memo?</p> <p>25 MR. DALY: A litigation, hold your documents, don't</p>

<p style="text-align: right;">46</p> <p>1 destroy documents relating to X, Y, and Z, the thing that</p> <p>2 you're supposed to do, when they've had this litigation</p> <p>3 pending for twelve years.</p> <p>4 THE COURT: What would you have found? I mean,</p> <p>5 that's why I wasn't persuaded. What would you have found if</p> <p>6 they had kept everything?</p> <p>7 MR. DALY: Tom Scully, the head administrator of</p> <p>8 CMS, he had all kinds of files on --</p> <p>9 THE COURT: But what would they have shown?</p> <p>10 MR. DALY: They would have shown further knowledge</p> <p>11 and --</p> <p>12 THE COURT: But we know that up the kazoo. The</p> <p>13 government knew. The government knew. The government knew.</p> <p>14 At least from all those OIG reports, they knew.</p> <p>15 MR. DALY: Well, they knew more than that, though.</p> <p>16 They knew about not only generalized spreads, they knew</p> <p>17 specific spreads, they knew everything, and we were trying to</p> <p>18 improve our case.</p> <p>19 THE COURT: Assume it's true.</p> <p>20 MR. DALY: Well, if we can assume it's true, then I</p> <p>21 haven't been prejudiced.</p> <p>22 THE COURT: I mean, they knew. They just, they</p> <p>23 were fighting, and they couldn't get it through Congress, and</p> <p>24 they couldn't get it through -- they knew as of, for sure,</p> <p>25 for sure, by 2001, but they pretty much knew by 1997 when you</p>	<p style="text-align: right;">48</p> <p>1 MR. DALY: Donna Shalala? Ms. Shalala?</p> <p>2 THE COURT: Yes. They knew. Why they didn't do</p> <p>3 surveys, that would be an interesting question.</p> <p>4 MR. GOBENA: Well, there's actually an answer to</p> <p>5 that, your Honor.</p> <p>6 THE COURT: Which is?</p> <p>7 MR. GOBENA: Which is that when the agency sought</p> <p>8 to do surveys, there was the Director of Payment Policy,</p> <p>9 Charles Booth, sent out a memo to carriers asking them to do</p> <p>10 surveys in 1994, right after the reg passed in '92. And the</p> <p>11 survey was actually killed by the Office of Management And</p> <p>12 Budget.</p> <p>13 Now, what we've learned in discovery is that Abbott</p> <p>14 as well as two or three other companies met with</p> <p>15 representatives of ASCO, the American Society of Clinical</p> <p>16 Oncologists, to get together to develop a strategy to go out</p> <p>17 and reach out to OMB and have OMB kill the study. And in</p> <p>18 fact --</p> <p>19 THE COURT: Maybe, but you are OMB. You know, it's</p> <p>20 one unitary Executive Branch government. I saw those</p> <p>21 documents in the last case. I know the pharmaceutical</p> <p>22 industry tried to, or at least some of them, tried to stop</p> <p>23 that survey; but at the end of the day, the person who</p> <p>24 stopped it was the federal government.</p> <p>25 MR. GOBENA: Well, I mean, they raised issues about</p>
<p style="text-align: right;">47</p> <p>1 had the Budget Act pass.</p> <p>2 MR. DALY: Yes.</p> <p>3 MR. GOBENA: And, your Honor, we're going to see,</p> <p>4 actually when we get to the summary judgment stage that while</p> <p>5 the agency might have known something about the drugs</p> <p>6 generally, it was trying to do its best to change things.</p> <p>7 And there were actually drug companies that lobbied Congress</p> <p>8 to block changes, Abbott being one of them. Actually that's</p> <p>9 one of the areas of discovery we're doing with the company</p> <p>10 right now is that they actually went to Congress people and</p> <p>11 tried to block the Secretary from having discretion to change</p> <p>12 drug --</p> <p>13 THE COURT: But you'd be hard-pressed to say you</p> <p>14 didn't know.</p> <p>15 MR. GOBENA: I understand, I understand, but</p> <p>16 there's knowledge, and it has to be knowledge and approval</p> <p>17 for the False Claims Act.</p> <p>18 THE COURT: Right, knowledge is different from</p> <p>19 approval. I mean, that's why I wasn't persuaded because I</p> <p>20 went through that trial. They knew. Maybe they didn't know</p> <p>21 about Aciclovir. I don't know. That may be one of your</p> <p>22 points. But they knew that AWP was a phony, fictional price</p> <p>23 by the mid-1990s. They knew. So that's why I wasn't</p> <p>24 persuaded. They knew. What's her name, she was trying to</p> <p>25 change it? She kept getting shot down.</p>	<p style="text-align: right;">49</p> <p>1 the burden hours to various people to respond to the</p> <p>2 documents or whatever, but --</p> <p>3 THE COURT: Sure, Small Business Regulatory Reform</p> <p>4 Act. I know that. I am simply saying that the federal</p> <p>5 government had the power to conduct the surveys; and whether</p> <p>6 it was HHS or OMB, the federal government didn't do it,</p> <p>7 although they knew AWP was a phony price. Now, what legal</p> <p>8 ramifications that has, I don't know, but I don't see the</p> <p>9 prejudice to you. I've got to go.</p> <p>10 MR. GOBENA: One thing I'd ask.</p> <p>11 THE COURT: What?</p> <p>12 MR. GOBENA: We'd ask your Honor to reconsider the</p> <p>13 15(c)(1) ruling on --</p> <p>14 THE COURT: Denied. You can't have it both ways.</p> <p>15 (c)(1) is different. See you later.</p> <p>16 MR. DALY: Thank you, Judge. Thanks for your time</p> <p>17 today.</p> <p>18 THE CLERK: Court is in recess.</p> <p>19 (Adjourned, 4:55 p.m.)</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>

1 CERTIFICATE
2
34 UNITED STATES DISTRICT COURT)
5 DISTRICT OF MASSACHUSETTS) ss.
6 CITY OF BOSTON)
78 I, Lee A. Marzilli, Official Federal Court
9 Reporter, do hereby certify that the foregoing transcript,
10 Pages 1 through 49 inclusive, was recorded by me
11 stenographically at the time and place aforesaid in Civil
12 Action No. 01-12257-PBS, MDL No. 1456, In re: Pharmaceutical
13 Industry Average Wholesale Price Litigation, and thereafter
14 by me reduced to typewriting and is a true and accurate
15 record of the proceedings.16 In witness whereof I have hereunto set my hand this
17 9th day of November, 2007.
18
19
2021 /s/ Lee A. Marzilli
2223 LEE A. MARZILLI, CRR
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